STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
KEVIN L. GRANT,	)	Civil Action No. 2021-CP-33-00342
Plaintiff,	)	
vs.	)	**ORDER**
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Defendant.	)	

On September 27, 2021 this Court heard the Defendant's Motion to Dismiss under SCRCP 12(b)(6). For the following reasons this motion is GRANTED.

The Defendant's Motion presents one question – can the Plaintiff, having recovered underinsured motorist (UIM) benefits from GEICO, now recover UIM benefits from State Farm when no car insured by State Farm was involved in the Plaintiff's accident? There is no question that Plaintiff is attempting to stack UIM benefits. "Stacking" has been defined as an insured's recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of all available policies. Continental Insurance Company v. Shives, 492 S.E.2d 808 (S.C. App. 1997); State Farm v. Moorer, 496 S.E.2d 875 (S.C. App. 1998); Auto Owner's Insurance Company v. Horne, 586 S.E.2d 865 (S.C. App. 2003); Burgess v. Nationwide, 644 S.E.2d 40 (S.C. 2007); Nakatsu v. Encompass Indemnity Company, 700 S.E.2d 283 (S.C. App. 2010); Nationwide Mutual Insurance Company v. Rhoden, 728 S.E.2d 477 (S.C. 2012) The fact that the involved vehicle was insured by a separate insurance company – here GEICO – than the insurance company insuring the at home vehicle – here State Farm – is insignificant under the

typical stacking analysis. Carter v. Standard Fire Insurance Company, 753 S.E.2d 515 (footnote 6) (S.C. 2013)

The circumstances under which stacking of UIM coverage is allowed is governed by § 38-77-160 of the South Carolina Code and the cases interpreting and applying that statute. Courts have consistently held to ascertain whether an insured may stack UIM benefits in accordance with § 38-77-160 the Court must determine whether the insured qualifies as a Class I or Class II insured. A Class I insured is an insured or a named insured who has a vehicle involved in the accident. National General Insurance Company v. Pena, 419 S.E.2d 375 (S.C. App. 1992); Ohio Casualty Insurance Company v. Hill, 473 S.E.2d 843 (S.C. App. 1996) A Class II insured is an insured whose vehicle was not involved in the accident. Although Class I insureds may stack UIM coverages, Class II insureds may not. Continental Insurance Company v. Shives, 492 S.E.2d 808 (S.C. App. 1997) In order to have a vehicle involved in the accident as a prerequisite to stacking, a person must be a Class I insured with respect to a vehicle involved in the accident. Auto Owner's Insurance Company v. Horne, 586 S.E.2d 865 (S.C. App. 2003)

In considering the Defendant's 12(b)(6) motion this Court must solely consider the allegations in the Complaint. Toussaint v. Ham, 357 S.E.2d 8 (S.C. 1987); Fabian v. Lindsay, 765 S.E.2d 132 (S.C. 2014) If matters outside the pleading are presented to and not excluded by the Court, the motion is treated as one for summary judgment. Patterson v. Witter, 871 S.E.2d 677, 684 (S.C. 2018) In opposing the Defendant's motion, Plaintiff has not submitted any affidavit to convert the Defendant's Rule 12(b)(6) motion to a motion for summary judgement. Accordingly, the merits of the Defendant's motion must be evaluated solely on the allegations in the Plaintiff's Complaint.

The Plaintiff's Complaint alleges the following:

- State Farm issued a policy on a 2012 Mercedes to the Plaintiff's wife (¶ 3);
- The Plaintiff was an insured under the State Farm policy (¶ 5);
- The State Farm policy provided $25,000 of UIM coverage (¶ 6);
- On July 16, 2018 while a pedestrian the Plaintiff was hit by a vehicle operated by one Hughes Sellers (¶ 9);
- Sellers was insured with Integon National Insurance Company which paid the $30,000 liability limits on that policy (¶ 11);
- The Plaintiff had UIM coverage with GEICO which paid to the Plaintiff the UIM limits of that policy of $100,000 (¶ 12).

There is no allegation in the Complaint the 2012 Mercedes insured with State Farm was involved in the Plaintiff's accident with Sellers.

Two things are undisputed from the allegations in the Plaintiff's Complaint – the Plaintiff is a Class II insured with regard to UIM coverage under the State Farm policy and the Plaintiff is attempting to stack UIM coverage under the State Farm policy on $100,000 of UIM benefits received from GEICO. The Plaintiff cannot escape the consequences of these allegations as parties are bound by the allegations in their pleadings. Charleston County School District v. Laidlaw Transit, 559 S.E.2d 362, 364 (S.C. App. 2001); Town of Kingstree v. Chapman, 747 S.E.2d 494, 509 (S.C. App. 2013); Dawkins v. Sell, opinion No. 5857, South Carolina Court of Appeals Sep. 1, 2021.

In opposing the Defendant's motion, Plaintiff argues this case presents an issue of novel impression because the Plaintiff was injured while a pedestrian and not as an occupant of a vehicle. It is true that novel questions of law should not ordinarily be resolved in a Rule 12(b)(6) motion. Chestnut v. AVX Corporation, 776 S.E.2d 82 (S.C. 2015) However, this general rule is

inapplicable where, as here, the determinative facts are not in dispute. Kubic v. MERSCORP, 785 S.E.2d 595, 598 (S.C. 2016) Here, the determinative facts are that the Plaintiff is attempting to stack UIM coverage from a State Farm policy on UIM benefits received from GEICO when the Plaintiff is a Class II insured with regard to the State Farm policy. The analysis of stacking is unaffected by whether the Plaintiff was a pedestrian standing adjacent to the vehicle insured with GEICO or was an occupant in the vehicle insured with GEICO at the time of the accident. Either way, the Plaintiff is attempting to do something the law forbids - stack UIM benefits when the Plaintiff is a Class II insured with regard to UIM coverage provided by State Farm. It is therefore irrelevant to this Court's analysis whether the Plaintiff was a pedestrian at the time of the accident or an occupant of a vehicle at the time of the accident. As our courts have observed, whatever does not make any difference does not matter. Spreeuw v. Barker, 682 S.E.2d 843, 849 (S.C. App. 2009); Powell v. Bank of America, 665 S.E.2d 237 (S.C. App. 2008)

This Court could deny the Defendant's Rule 12(b)(6) motion and give the parties an opportunity to engage in discovery and the Defendant could, after having conducted discovery, return to the Court with a motion for summary judgment. There is no reason to believe, however, that the facts germane to the merits of the Plaintiff's case will be any different in the context of a motion for summary judgment than in the context of a Rule 12(b)(6) motion. Simply denying the Defendant's Rule 12(b)(6) motion to allow the parties to engage in discovery when the facts relevant to the Defendant's motion are not in dispute will be wasteful to the parties and a waste of judicial resources.

The Plaintiff further argues that because UIM coverage is portable the Plaintiff should be allowed to recover UIM benefits under the State Farm policy notwithstanding the Plaintiff's status as a Class II insured and that the Plaintiff has already recovered UIM benefits from GEICO. This

argument confuses the concept of the portability of UIM coverage with the concept of stacking of UIM coverages. The seminal case on the portability of UIM coverage – Burgess v. Nationwide, 644 S.E.2d 40 (S.C. 2007) - did not involve stacking; instead, it involved the portability of UIM insurance. "These [stacking and portability] are two distinct concepts. Stacking is only allowed if the insured has the specific type of coverage on the vehicle involved in the accident. On the other hand, portability refers to a person's ability to use his coverage on a vehicle not involved in an accident as a basis for recovery of damages sustained in the accident." Nakatsu v. Encompass Indemnity Company, 700 S.E.2d 283, 288 (S.C. App. 2010) Indeed, acceptance of the Plaintiff's argument would render meaningless the distinction between Class I and Class II insureds and would directly contravene the language in Section 38-77-160.

Finally, although not mentioned at the hearing of September 27, 2021, the Plaintiff's memorandum in opposition to State Farm's motion to dismiss quotes a part of paragraph 5 of State Farm's policy in the section concerning UIM coverage. The part of the policy quoted in the Plaintiff's memorandum, however, omits the first part of paragraph 5 which states that paragraph 5 is "subject to items 1, 2, 3, and 4 above..." None of these 5 paragraphs mention the word stacking nor do these provisions in the policy allow an insured to stack UIM benefits in circumstances under which the insured would otherwise be precluded from stacking UIM benefits. Instead, these paragraphs of the policy concern whether State Farm's UIM coverage is primary or excess to other policies providing UIM coverage. While these provisions may determine primary vs. excess UIM coverage as between multiple insurers, this part of the policy provides no relief to the Plaintiff.

For the foregoing reasons the Defendant's Rule 12(b)(6) motion is GRANTED and this case is dismissed with prejudice.

ALL OF WHICH IS SO ORDERED.

Marion Common Pleas

Case Caption: Kevin L Grant VS State Farm Mutual Insurance

Case Number: 2021CP3300342

Type: Order/Dismissal

So Ordered

s/ The Honorable Michael G. Nettles #2140